11-1700-7614-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by
David Beaulieu, Commissioner,
Department of Human Rights,

Complainant,

vs.

J.C. Penney Company, Inc.,

Respondent.

FINDINGS OF FACT.
CONCLUSIONS,
AND
ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on April 29 and 30, 1993 in Room 134, Stearns County Courthouse, St. Cloud, Minnesota. The hearing was held pursuant to a Complaint and a Notice of and Order for Hearing issued by the Commissioner of Human Rights on or about March 4, 1993.

Erica Jacobson, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of Complainant, Minnesota Department of Human Rights ("the Department"). Alan J. Butler, Senior Attorney, J.C. Penney Co., Inc., 1901 N. Roselle Road, Schaumburg, Illinois 60195-3182, appeared on behalf of Respondent, J.C. Penney Company, Inc. ("J.C. Penney"). The record closed on July 9, 1993, upon receipt of the parties' reply briefs.

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. 363.072, the Commissioner of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 4.63 through 14.69.

STATEMENT QF ISSUES

The issues in this case are as follows:

(1) Whether the Respondent discriminated against the Charging Party,

Becky Tinglov, in the terms and conditions of her employment at J.C. Penney because of her sex in violation of Minn. Stat. 363.03, subd. 1(2)(c);

(2) Whether the Charging Party was forced to resign to escape intolerable working conditions and was, therefore, constructively discharged in violation of Minn. Stat. VXEG E DQG

(3) What relief should be ordered to remedy any statutory violations that occurred.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Becky Tinglov, a woman who was born on January 19, 1958, was employed as a part-time custodian in the maintenance department of the J.C. Penney store in St. Cloud, Minnesota, from October 10, 1990, to October 11, 1991. Complaint and Answer, paragraph 4 and 7; Exs. 6, 7; T. 23, 52.

2. Ralph Vasek has been the manager of the maintenance department in J.C. Penney's St. Cloud store for approximately six years. T. 181. He was the manager of the maintenance department in J.C. Penney's St. Cloud store throughout the period of Ms. Tinglov's employment and was Ms. Tinglov's supervisor. T. 24, 182. Mr. Vasek's management duties include making recommendations regarding the hiring and firing of employees. His recommendations are generally followed. T. 182-83, 233, 317. In addition, Mr. Vasek has the authority to assign work to and discipline employees in the maintenance department. T. 183, 233, 317.

3. Leroy Lebacken has worked in the maintenance department of Respondent's St. Cloud store as a maintenance technician since approximately June, 1990. T. 155. Mssrs. Lebacken and Vasek are the only maintenance department employees who hold class C boiler licenses and are employed full-time. T. 177, 200, 316. Mr. Lebacken is not a manager, his photograph is not posted with the photographs of the store's management, and he does not have the authority to hire, fire or schedule employees. T. 172-73, 176, 23132, 232, 298, 316.

4. Mssrs. Vasek and Labacken have known each other for 30 years and are good friends. T. 157, 193. Mr. Vasek informed Mr. Lebacken of the job opening for his present position, asked him to apply, and participated in hiring him. T. 193.

5. When Mr. Vasek was not at work, the store's Operations and Personnel Manager was officially in charge of the maintenance department.

T. 233-34, 317. During the period of Ms. Tinglov's employment, Robert Thompson was the Operations and Personnel Manager of the St. Cloud store. T. 290. As a practical matter, however, Mr. Lebacken was viewed by Ms. Tinglov and some other maintenance department employees as being in charge of the people in the department when Mr. Vasek was absent. T. 25, 140. When Mr. Vasek was absent, Mr. Lebacken told the maintenance workers what to do, took care of problems which Mr. Vasek would have handled if he had been there, and would "oversee to make sure everything is done." T. 26-27, 72-73, 158-59, 173, 175, 194. Sometimes Mr. Lebacken would tell custodians what jobs to do even when Mr. Vasek was present. T. 26-27.

6. Ms. Tinglov believed that Mr. Lebacken's position was that of assistant manager. T. 26; Exs. 7, 51.

7. Between approximately January, 1991, and October, 1991, Mr. Lebacken touched Ms. Tinglov on at least five occasions:

a. In January or February, 1991, Mr. Lebacken came up to Ms. Tinglov and brushed against her breasts with both of his hands, saying, "You have something on you." T. 53.

b. Once, when Ms. Tinglov was wearing a buttoned shirt, Mr. Lebacken put his hand in her shirt buttons, brushed against her breast as he was pulling her shirt out, and said, "Oh, it's buttoned." Ms. Tinglov "backed off and looked." T. 28, 55; Ex. 7.

C. On another occasion, Mr. Lebacken brushed Ms. Tinglov's buttocks twice with both his hands when they were riding in the maintenance elevator, saying, "You had something on you." She moved away and said, "I can get that myself." T. 30, 55-56. Shortly after the incident in the maintenance elevator, Ms. Tinglov told Mr. Lebacken that she had been sexually abused as a child and did not want him to touch her. T. 30, 58, 59, 161; Exs. 6, 7, 9. Although she believed he had touched her in the elevator on purpose, she did not want to "make waves" and thus acted as though his touching her had been accidental. T. 30; Exs. 6, 7. She hoped that he would stop touching her after she talked to him. T. 30; Ex. 6.

d. The day after Ms. Tinglov confided to Mr. Lebacken that she had been sexually abused as a child and told him not to touch her, Mr. Lebacken brushed Ms. Tinglov's shoulder. He then said, "Oh, I forgot," in a joking tone of voice. T. 31, 58-60, 66; Exs. 6, 7.

e. On September 19 or 20, 1991, Mr. Lebacken and Ms. Tinglov were walking down an aisle by the menswear in the store. He was carrying a floor tile in his hand. As they were walking, Mr. Lebacken reached behind her and, with a swing, stuck the edge of

the floor tile between her buttocks. Ms. Tinglov became angry and said she'd slap him if he did that again. T. 32, 36, 60; Exs. 6, 7, 51.

B. Mr. Lebacken never asked Ms. Tinglov for permission before he touched her to "clean her off." T. 29, 327. Ms. Tinglov never encouraged or invited Mr. Lebacken to touch her. She did not like or welcome his touching her body. It made her feel cheap and caused her to wonder if she had done something wrong. T. 31.

9. Later during the morning of the tile incident on September 19 or 20, 1991, Ms. Tinglov was sitting at a table in the lunch room with various maintenance employees. She overheard Mr. Lebacken tell Mr. Vasek, "I stuck a tile between Becky's crack and she got mad and said, 'If you do that again, I'll hit you,'" or words to that effect. T. 34; Exs. 6, 7. Mssrs. Vasek and Lebacken were both smiling and laughing. T. 34, 150. Ms. Tinglov became angry and upset. She stared at Mr. Vasek, who saw her and stopped laughing. She got up and left the table. T. 34-35; 163; Ex. 7.

10. Mr. Vasek did not ask Ms. Tinglov about the tile incident. T. 35, 197, He would have asked her about the incident only if he had seen it himself or if she had filed a formal complaint. T. 197, 202-03. Mr. Vasek did not discipline Mr. Lebacken. T. 193.

11. After the incident in the lunchroom, Ms. Tinglov felt hurt, angry, helpless, and humiliated. T. 35; Ex. 6. She "felt like there was nobody to turn to because, you know, now that it's in public, the whole lunchroom could have heard it and them [Mssrs. Vasek and Lebacken] laughing about it. I was hurt, and I was angry, and I just didn't know what to do anymore, and I just couldn't take it anymore. . . ." T. 35.

12. Ms. Tinglov did not formally complain to Respondent's management about Mr. Lebacken's conduct. T. 39. She "felt (she] had no one [at J.C. Penney] to go to." T. 39, 81, 100. She did not believe that there was any point in complaining to the manager, Mr. Vasek, because he was "best friends" with Mr. Lebacken and because he had laughed when Mr. Lebacken told him about the incident with the tile. T. 40. She "felt that him and LeRoy would just get together and it would just be a joke and he would -- he wouldn't do anything about it and either I would be overloaded with work or harassed or I would end up quitting my job anyway because there was no way I could handle it, and I felt that Ralph would just get angry with me and protect LeRoy." Id. She also believed that it was futile to complain to Robert Thompson, the Operations and Personnel Manager in the St. Cloud store, because he appeared to be friends with Mssrs. Lebacken and Vasek. T. 75, 78-79, 98, 110. In addition, she believed that it would make Mr. Vasek angry if she went over his head. T. 98; Ex. 7.

13. Ms. Tinglov was the victim of sexual abuse when she was a child. T. 51-52; Ex. 6. She had been in counseling with Julie Spare and Connie Schultz prior to her employment at J.C. Penney. Ex. 6. Ms. Tinglov began seeing Ms. Schultz, a licensed independent clinical social worker who specializes in treating sexual abuse issues, in approximately April 1989.

T. 242. Ms. Tinglov participated in a therapy group run by Ms. Schultz for women survivors of childhood sexual abuse. id. The group met on a weekly basis for four to five months and ended in January 1991. T. 242-43. At the end of the group sessions, Ms. Schultz considered Ms. Tinglov to be in "pretty good shape. She was making good decisions[,] . . . was taking good care of herself. . . [and) was doing a good job problem-solving. She was single-parenting her children . . [and] had been doing a good job; family was stable. Becky's self-esteem was in good shape." T. 243. Tinglov returned to therapy in June 1991.]

14. Ms. Tinglov did not go to Ms. Schultz again for counseling until June 4, 1991. T. 243. At that time, Ms. Tinglov reported and presented with more depression, tearfulness, and a decline in self-esteem. T. 255-56. She reported to Ms. Schultz that she was struggling with handling and coping with increased harassment at work by "LeRoy," including being teased about her body, attempts to be touched or being touched, and sexually degrading jokes, comments, gestures, or looks. T. 257-58. Ms. Tinglov told Ms. Schultz that she felt more and more stressed, ashamed, and unable to protect herself as a result of what she was experiencing at work and that she was experiencing disturbances in sleeping and concentration, struggling with an eating disorder (binging and purging), and withdrawing from social activities such as dancing. T. 244, 256-60. Ms. Tinglov saw Ms. Schultz three or four times

during June to deal with these symptoms. T. 258. During some of those sessions, Ms. Tinglov's symptomatology became even more severe. It. By the end of June, Ms. Tinglov "seemed somewhat improved". T. 259.

15. Ms. Tinglov returned to Ms. Schultz during mid to late September, 1991. T. 260. Her symptoms were more severely escalated than they had been in June. T. 275. Ms. Tinglov was "clearly decompensating . . . [or] falling apart so to speak. Her symptomatology, the depression, the isolation, the binging and purging, the self-blame, the self-hate was really pretty severe, extremely tearful , much difficulty maintaining a conversation and concentrating even throughout the time frame of the therapy session itself. [Ms. Schultz] was extremely concerned about Becky by the end of September. Suicidal ideation was occurring without a plan." T. 260-61.

16. Ms . Tinglov's psychological problems during June and September (as described above) had increased as a direct result of the sexual harassment, fear, and intimidation she was experiencing at J.C. Penney. T. 261-64.

17. In late September, Ms. Schultz recommended to Ms. Tinglov that she resign from her job at J.C. Penney. T. 271-72, 283.

18. In September, 1991, Ms. Schultz recommended that Ms. Tinglov increase the frequency of their sessions and that Ms. Tinglov have a psychiatric consultation to try to help with the depressive symptoms. T. 264-65. In his report in October, 1991, the psychiatrist noted an increase in depressive symptoms, decided to continue to see her, and recommended that she consider resigning from her job. T. 271, 282. Although the psychiatrist did not prescribe medication for Ms. Tinglov during his first meeting with her, he later put her on medication. T. 271, 282.

19. Ms. Tinglov filed a charge of discrimination with the Department of Human Rights on September 25 or 26, 1991. T. 36, 86; Ex. 6. Intake Officer Jan Tarvestad advised Tinglov to remain at work. T. 84, 86.

20. Because of the touching incidents, Ms. Tinglov's inability to stop the touching, and her emotional upset, Ms. Tinglov decided to quit her job.

T. 38, 85. On September 27, 1991, she submitted a "Separation Interview Questionnaire" informing J.C. Penney that she intended to resign effective October 11, 1991. Ex. 50. She gave two weeks' notice because she wanted to do the right thing and felt that she was responsible for giving such notice. T. 39. On her Separation Questionnaire form, Ms. Tinglov wrote that she was leaving for "personal reasons." T. 96; Ex. 50. By "personal reasons", she meant Mr. Lebacken's touching her and the harassment she received at work. T. 97. She was afraid that if she revealed to Respondent that she was leaving because of sexual harassment, she would be retaliated against and given a heavier job load during her final weeks of employment. T. 97, 100.

21. After Ms. Tinglov had given her two weeks' notice, and possibly on Ms. Tinglov's last day of work, Ms. Tinglov had a conversation with Carol Danzeisen, switchboard operator and receptionist at the St. Cloud store, regarding quitting her job. T. 323. Ms. Tinglov told Ms. Danzeisen only that she was quitting because "something happened" and said that she did not want to talk about why she was leaving. Ms. Danzeisen then said, "If you like your job, you shouldn't have to quit. Why don't you go see Bob (Thompson, the Operations and Personnel Manager]." T. 324. Ms. Tinglov did not talk to Mr. Thompson before she left her employment.

22. Prior to the time Ms. Tinglov resigned, she had received two pay increases. Her rate of pay at the time of her resignation was $5.25 an hour. She was eligible to work 21 hours a week. Exs. 1, 2. During her employment with J.C. Penney, Ms. Tinglov averaged 17.5 hours of work a week. Exs. 65, 66.

23. Mssrs. Lebacken and Vasek told jokes of a sexual nature at work. T. 117-18, 141-42, 159, 194. Mssrs . Lebacken and Vasek told such jokes to each other and sometimes told them in the presence of female employees. T. 141-42, 159.

24. Tab Dornbusch was employed by J.C. Penney in the maintenance department during part of the time that Ms. Tinglov was employed. T. 113. Mr. Lebacken remarked to Mr. Dornbusch that "Becky has nice breasts, nice boobs." T. 115. In addition, after Ms. Tinglov bent over on one occasion at work, Mr. Lebacken told Mr. Dornbusch that he had seen Ms. Tinglov's "boobs" through the top of her shirt. T. 115-16. Mr. Lebacken also told Mr. Dornbusch that he got a shot at another employee's "boobs" when she bent over at work one day and commented to him about some topless sunbathers he had seen. T. 116, 117.

25. Denise Doering was also employed by J.C. Penney in the maintenance department during part of the time that Ms. Tinglov was employed. Mr. Lebacken flirted with Ms. Doering by putting his arm around her, giving her a hug and patting her back. T. 141. A few times she felt uncomfortable and walked away from him. id, Also, sometimes when he came into the area where she was cleaning and no one else was near, she felt cornered and felt that he was "eyeing her up" as though she was not wearing any clothes. id.

26. Before Mr. Dornbusch left his employment with J.C. Penney on May 31, 1991, Ms. Tinglov complained to him that Mr. Lebacken was touching her. T. 113, 118-120. When Ms. Tinglov talked to him about it, she was scared and "pretty much a mess emotionally." T. 118-19.

27. Between August and the end of her employment, Ms. Tinglov complained to co-workers Donna Lamphere and Sohel Wahed about Mr. Lebacken's conduct. T. 132, 148. Ms. Tinglov was upset and told Ms. Lamphere about Mr.

Lebacken's touching or brushing up against her breasts. T. 132. Ms. Tinglov told Mr. Wahed that Mr. Lebacken had pushed aside her blouse on one occasion in an attempt to look at her breasts. T. 148.

28. Approximately two weeks after the termination of Ms. Tinglov's employment, Donna Lamphere complained to Vasek about a male co-worker who called her a "bitch." T. 129. Mr. Vasek gave Ms. Lamphere "the feeling that I was bothering him or that he wasn't going to do anything about it. I just felt like I was getting blown off." Id. She then complained to a woman in the personnel office about the male co-worker who called her a "bitch" and about her perception that Mr. Vasek was treating the women custodians unfairly in job assignments. T. 130. The woman in the personnel office brought the matter to the attention of Mr. Thompson, who talked with Mr. Vasek about it. T. 188, 311. Mr. Vasek then called Ms. Lamphere into his office. T. 188. Mr. Vasek was "extremely upset. He was very mad . . . . He was mad that I had went over his head to talk . . . about the problem . . . ." T. 130-31. He complained about her performance and threatened that her hours might be cut, and he said Mr. Thompson would stand behind him. T. 131. As a result, Ms. Lamphere quit her job. T. 132. Later, Mr. Thompson gave Mr. Vasek a verbal

warning, told him not to threaten an employee's position or employment again, and informed him that employees should be allowed to seek other avenues of recourse if they felt he was not taking action on their concerns. T. 311-12; Ex . 64.

29. After J.C. Penney received a copy of Ms. Tinglov's charge of discrimination on November 1, 1991, her allegations came to the attention of Mssrs. Thompson and Cihlar. They conferred with their District Personnel Manager and Regional Personnel Relations Attorney in accordance with established company procedures. T. 207, 293. They then proceeded to interview Mssrs. Vasek and Lebacken; maintenance department employees Von Becker, Carol Schlicter, Roxanne Serna, Judy Teske, and Mildred Heinen; and non-maintenance employees Connie Umerski, Nancy Holy, Marie Hasselfeldt, Irene Ruhland, and Carol Danzeisen. T. 207, 293, 301-04. Mr. Lebacken denied engaging in sexual harassment and submitted a written statement. T. 229, 303; Ex. 9. In that statement, Mr. Lebacken denied having touched Ms. Tinglov or anyone else on the breast and said he had "never touched [Ms. Tinglov's] buttocks with sex on [his] mind." He admitted brushing lint off Ms. Tinglov's shoulder, bumping her "in what I call her leg or hip" with a piece of tile, giving her a "hug" as a gesture of thanks for some work she did, being told by Ms. Tinglov that she had been sexually abused as a child, and telling Mr. Vasek about the "tile incident and how Becky told me off." Ex. 9. Mr. Thompson did not interview Ms. Tinglov, Ms. Doering, or Mr. Dornbusch. T. 228-30, 235, 301-08. Mssrs. Thompson and Cihlar then concluded that Ms. Tinglov's charges were groundless. T. 308. Mr. Cihlar based his conclusion that "LeRoy was innocent" on the interviews, Mr. Lebacken's written statement, and "knowing, you know, LeRoy. I just felt very strongly that he wouldn't do anything like that." T. 231.

30. J.C. Penney has not disciplined or punished Mr. Lebacken for his treatment of Ms. Tinglov. T. 165, 231, 308-09.

31. Between November 1991 and April of 1992, Ms. Tinglov attended classes for one or two hours a day, three days a week, and took homework home. T. 48. She obtained her GED (high school equivalency degree) in April of 1992. T. 43.

32. On January 15, 1993, Ms. Tinglov received an unconditional offer of reinstatement from J.C. Penney. T. 42; Exs. 8, 65, 66. J.C. Penney assured Ms. Tinglov as part of the offer that "the type of conduct which she alleges will not be tolerated and will not occur." Exs. 8, 65. Ms. Tinglov refused to return to her old job because Mssrs. Lebacken and Vasek would still be there and she was afraid that they would harass her and not treat her fairly. T. 42.

33. Ms. Tinglov has not been employed since she left J.C. Penney. T. 40. After leaving J.C. Penney, she looked at job advertisements in the St. Cloud Times and the "Shopper" publications. T. 95-96. She wanted her job to be on a bus line and to have early morning hours. T. 95, 110-11. She picked up an application for a job cleaning a nursing home in Sauk Rapids, but the job was taken before she submitted her application. T. 43, 46. She also unsuccessfully sought work at an ice cream parlor in Crossroads Mall. T. 105-06.

34. In October, 1991, when Ms. Tinglov left J.C. Penney, she was not psychologically fit to work at another job. Her "tearfulness, her difficulty

with sleep, the escalation of her eating disorder, her self-confidence, her ego functioning, all of those issues were so severe at that time" that she could not have held a job. T. 272-73.

35. Because of Ms. Tinglov's history of childhood molestation, the touching incidents at J.C. Penney affected her more severely than they would be expected to affect an individual who lacked such a history. T. 273-74.

36. J.C. Penney Company, Inc., is a large company with substantial financial resources. Its 1991 annual report indicates that the company had approximately 185,000 employees at the end of 1991. The company had over 1,000 J.C. Penney stores, over 2,000 catalog units, and over 500 drug stores. Total retail sales (in millions) were $16,201 in 1991 and $16,365 in 1990. Total revenue (in millions) was $17,295 in 1991 and $17,410 in 1990. Net income (in millions) was $80 for 1991 and $577 for 1990. Exs. I and 2.

37. During 1991, J.C. Penney had a written policy prohibiting sexual harassment. T. 208-18, 294-95; Exs. 53, 54, 56 and 57. Mr. Lebacken and several other maintenance department employees, however, were not aware during 1991 of J.C. Penney's policy regarding sexual harassment. T. 132, 142, 154, 165-66.

38. Ms. Tinglov was given a copy of an "Associate Handbook" on October 10, 1990. T. 220, 298; Ex. 59. It did not have a section that was entitled or focused upon "sexual harassment" or "sex discrimination." id. The Handbook is approximately 42 pages long and mentions sexual harassment only in the following sentence found in the middle of a paragraph about "Selection and Placement":

> JCPenney policy regarding equal employment opportunity is to employ, train, promote, upgrade, and otherwise provide equal terms and conditions of employment to all individuals and associates without regard to race, color, religion, national origin, sex (including freedom from sexual harassment), age, or physical or mental handicap.

Id. at 2. In a later section addressing "Communications," the Handbook instructs an associate to bring problems to the attention of his or her supervisor. In the event that the supervisor "cannot provide a satisfactory resolution" of the problem, the associate is told to "pursue the matter through the appropriate staff member, personnel associate, or ultimately with the unit manager." id, at 12-13. The Handbook does not contain any specific instructions on how to complain about sexual harassment.

39. An "Affirmative Action/Equal Employment Opportunity" poster was posted at Respondent's St. Cloud store during 1991. T. 216; Ex. 57. It restated virtually verbatim the language quoted above from the "Selection and Placement" portion of the Handbook, including the reference to "freedom from sexual harassment." It further stated that "an associate" with a question or complaint should contact Bob Thompson, or, if contacting him is not acceptable or reasonable, Mr. Cihlar (the Store Manager). Ex. 57. The posting was located on a bulletin board with other postings, including worker's compensation postings. T. 321. The bulletin board was in a hallway through

which employees would walk to visit the restrooms, go to their lockers, pick up their money, and sign in and out. T. 296-97. MS. Tinglov never read anything on the bulletin board or saw this posting. T. 109, 328. Mr. Lebacken also was not aware of the posting until after his deposition was taken on March 23, 1993. T. 165-66.

40. An "Associate Participation Policy" was also posted on a bulletin board at the St. Cloud store during 1991. T. 217-18; Ex. 58. This policy, which did not specifically mention sexual harassment, provides, inter Ilia, as follows:

> It is our policy at this JCPenney facility to have the management staff available for associates. This means that any associate can arrange to meet privately with any management associate, including the Manager, to question, suggest, criticize or discuss any aspect of being a JCPenney associate. In doing so, the associate can be assured that his or her standing in the Company will not be affected.
>
> Although you can raise any issue at any level, normally the best and quickest way of resolving anything is to bring it to the attention of your Supervisor. You are encouraged to seek him/her out. In the event he or she cannot provide a satisfactory resolution of any problem, you should pursue the matter through the Manager or ultimately with the District Manager . . . .

Ex. 58. This posting was on the same bulletin board as the Affirmative Action/ Equal Employment Opportunity poster, with the workers' compensation postings. T. 321. Ms. Tinglov did not see this posting. T. 328.

41. J.C. Penney uses the term "associate" to encompass all employees. T. 219. Ms. Tinglov did not consider herself and the other maintenance employees to be "associates." T. 328. She thought that associates were retail salespersons who had customer contact. T. 328; Ex. 7.

42. J.C. Penney issued a memorandum relating to sexual harassment to store managers in 1981 and provided information relating to sexual harassment to managers in 1983 and 1992 to be included in the J.C. Penney Digest of Personnel Laws. T. 208-11, 299; Exs. 53, 54, 60. J.C. Penney also disseminated a Statement of Business Ethics to management associates which included a 1986 revision alluding to employment laws dealing with sexual harassment creating company liability for associate dealings with employees of suppliers and provided scripts for the discussion of sexual harassment with management associates and supervisors in 1988 and 1992. T. 213-16, 300-01;

Exs. 55, 56, 61.

43. During February and/or March, 1993, J.C. Penney conducted meetings with employees regarding sexual harassment. T. 223-24; Ex. 62. The meeting attended by Mr. Lebacken lasted 30-45 minutes and consisted of a video cassette. T. 165. This meeting occurred during March of 1993 and was the first time anyone spoke with Mr. Lebacken about J.C. Penney's policy on sexual harassment. T. 165.

44. The parties waived the requirement set forth in Minn. Stat. 363.071, subd. 2 (1990), for personal service on the Respondent and service by registered or certified mail on the Complainant and agreed that service by certified mail on both parties would be sufficient.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat. 363.071 and Minn. Stat. 14.50 (1990).

2. The Notice of and Order for Hearing was proper as to form, content, and execution, and all other relevant substantive and procedural requirements of law and rule have been satisfied.

3. The Respondent, J.C. Penney Company, Inc., is an "employer" within the meaning of Minn. Stat. 363.01, subd. 17 (1990), and Becky Tinglov, the Charging Party, was an "employee" within the meaning of Minn. Stat. 363.01, subd. 16 (1990).

4. The Minnesota Human Rights Act prohibits covered employers from discharging or discriminating against an employee with respect to terms, conditions, or privileges of employment because of sex, except when based on a bona fide occupational qualification. Minn. Stat. 363.03, subd. 1(2) (1990).

5. The Complainant, the State of Minnesota and the Commissioner and Department of Human Rights, has the burden of proof to establish by a preponderance of the evidence that the Respondent engaged in unlawful discrimination.

6. Pursuant to Minn. Stat. 363.01, subd. 14 (1990), discrimination based on sex includes sexual harassment. "Sexual harassment" is defined to include:

> unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:
>
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile or offensive employment . . . environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and

appropriate action."

Minn. Stat. 363.01, subd. 41 (1990).

7. A cause of action arises for damages under the Minnesota Human Rights Act in situations where an employee has been constructively discharged,

i e. , where the employee has "resign[ed] in order to escape intolerable working conditionscaused by illegal discrimination." Continental Can Co. v.
State, 297 N.W.2d 241 , 251 (Minn. 1980) ; See also Danz v. Jones 263 N.W.2d 395, 403 n.4 (1978) ("a resignation which is caused by illegal discrimination is a constructive discharge"): Wheeler v. Southland Corp., 875 F.2d 1246, 1249-50 (6th Cir. 1989) (if a reasonable employer would have foreseen that the
employee would resign in the light of the treatment she was receiving, a constructive discharge claim will lie) .

8. The Complainant established that Ms. Tinglov was the victim of unwelcome sexual advances, sexually motivated physical contact, and other verbal or physical conduct or communication of a sexual nature which substantially interfered with her employment and created an intimidating, hostile, and offensive working environment for purposes of Minn. Stat. 363.01, subd. 41 (1990).

9. The Respondent engaged in an unfair discriminatory practice in violation of the Minnesota Human Rights Act by failing to take timely and appropriate action upon learning of the possibility that Ms. Tinglov was being
harassed by Mr. Lebacken.

10. The Respondent's duty to take timely and appropriate action with respect to Mr. Lebacken's harassment was not excused by the Charging Party's failure to lodge a formal complaint with managerial personnel regarding the harassment since Mr. Vasek, the Charging Party's supervisor, had actual notice
of the harassment.

11. Ms. Tinglov's resignation constituted a constructive discharge.

12. The Respondent has the burden of proof to establish that Ms. Tinglov failed to mitigate her damages.

13. The Respondent failed to carry its burden of establishing that Ms. Tinglov failed to mitigate her damages.

14. Minn. Stat. 363.071, sud. 2 (1990), permits an award of compensatory damages up to three times the amount of actual damages sustained by the victim of discrimination. Ms. Tinglov is entitled to compensatory damages in the amount of $8,912.00, which is the amount of the wages she would
have earned had the Respondent not discriminated against her.

15. Under Minn. Stat. 363.071, subd. 2 (1990), victims of discrimination are entitled to compensation for mental anguish and suffering resulting from discriminatory practices. In this case, Ms. Tinglov experienced mental anguish and suffering as a result of the Respondent's discriminatory conduct and is entitled to compensation for the mental anguish and suffering she has sustained in the amount of $25,000.00.

17. Under Minn. Stat. 363.071, subd. 2, and the standards set forth in Minn. Stat. 549.20 (1990), punitive damages may be awarded for discriminatory acts where there is clear and convincing evidence that the acts

of the employer show a deliberate disregard for the rights or safety of others. In this case, the Complainant is entitled to punitive damages in the amount of $2,000.00.

1 8. Minn. Stat. 363.071, subd. 2 (1990), requires the award of a civil penalty to the State when an employer violates the provisions of the Human Rights Act. Taking into account the seriousness and extent of the violation, the public harm occasioned by it, the financial resources of the Respondent, and whether the violation was intentional, the Respondent should pay a civil penalty to the State in the amount of $7,500.00.

19. These Conclusions are made for the reasons set forth in the Memorandum which follows. The Memorandum is incorporated herein by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. The Respondent shall cease and desist from any further sexual harassment and shall distribute its sexual harassment policies and procedures to all employees within sixty days.

2. The Respondent shall pay total damages to Becky Tinglov in the amount of $34,912.00, calculated as follows:

Compensatory damages in the amount of lost wages	$ 8,912.00
Damages for mental anguish and suffering	25,000.00
Punitive damages	2,000.00
Total	35,912.00

The Respondent shall also pay Ms. Tinglov prejudgment interest on lost wages of $8,912.00 from October 11 , 1991 , pursuant to Minn. Stat. 334.01 (1990).

3. The Respondent shall pay a civil penalty to the State by filing a payment with the Commissioner of Human Rights (check made payable to State Treasurer, General Fund) in the amount of $7,500.00.

4. All payments ordered shall be made within thirty calendar days of the date of this Order.

Dated: August 19, 1993.

BARBARA L. NEILSON
Administrative Law Judge

Reported: Collen M. Sichko
Registered Professional Reporter
Shaddix & Associates
9100 West Bloomington Freeway, Suite 103
Bloomington, Minnesota 55431

MEMQRANDUM

Sexual Harassment Claim

The Department alleges that J.C. Penney violated the Minnesota Human Rights Act ("MHRA") by failing to take prompt and appropriate act i on to remedy sexual harassment of Becky Tinglov by a co-worker, LeRoy Lebacken. The Department contends that Ms. Tinglov was, in effect, constructively discharged from her position as a part-time custodian in the Maintenance Department of the J.C. Penney store in St. Cloud because she found it intolerable to continue working with Mr. Lebacken.

The MHRA provides that, "[e]xcept when based on a bona fide occupational qualification, it is an unfair employment practice..... [f]or an employer, because of..... sex . . . . to discharge an employee; or..... to discriminate against an employee with respect to . . . terms, . . . conditions, facilities, or privileges of employment." Minn. Stat. 363.03, subd. 1(2)(b) and (c) (1990). Discrimination based on sex is defined to include sexual harassment. Sexual harassment, in turn, is defined to include "verbal or physical conduct or communication of a sexual nature when..... that conduct or communication has the purpose or effect of substantially interfering with an individual's employment..... or creating an intimidating, hostile, or offensive employment . . . environment," and "the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action." Minn. Stat. 363.01, subd. 10a (1990).

Discrimination charges arising under the MHRA must be analyzed in accordance with the method of analysis first set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) for use in cases arising under Title VII of the federal Civil Rights Act of 1964. See e.g. Danz v. Jones 263 N.W.2d 395, 399 (Minn. 1978); Sigurdson v. Isanti County, 386 N.W.2d 715 719 (Minn. 1986). This approach consists of a three-part analysis which first requires the complainant to establish a prima facie case of disparate treatment based upon a statutorily prohibited discriminatory factor. Once a prima facie case is established, a presumption arises that the respondent

unlawfully discriminated against the complainant. The burden of producing evidence then shifts to the respondent who is required to articulate a legitimate, non-discriminatory reason for its treatment of the complainant. If the respondent establishes a legitimate, non-discriminatory reason, the burden of production reverts to the complainant to demonstrate that the respondent's claimed reasons are pretextual. Anderson_v. Hunter, Keith, Marshall and Co., 417 N.W.2d 619, 623 (Minn. 1989). The burden of proof remains at all times with the complainant. Fisher Nut Co, v. Lewis ex-rel. Garcia, 320 N.W.2d 731 (Minn. 1982); Lamb v. Village of Bagley, 310 N.W.2d 508, 510 (Minn. 1981).

The elements of a prima facie case of discrimination vary depending upon the type of discrimination alleged. A prima facie case of sexual harassment is established by showing that:

(1) The employee is a member of a protected class;

(2) The employee was subjected to unwelcome sexual harassment;

(3) The harassment complained of was based on sex;

(4) The harassment affected a term, condition, or privilege of employment or created an intimidating, hostile, or offensive working environment; and

(5) The employer is liable for the harassment that occurred based on its actual or imputed knowledge of the harassment and its failure to take appropriate remedial action.

Johnson v. Ramsey County, 424 N.W.2d 800, 808 (Minn. Ct. App. 1988); Klink v. Ramsev County, 397 N.W.2d 894, 901 (Minn. Ct. App. 1986). In determining whether Ms. Tinglov was the victim of unwanted sexual harassment, all the circumstances surrounding the alleged harassment must be examined, including the nature and frequency of the incidents and the context in which they occurred. Continental Can_Co. v._state, 297 N.W.2d 241, 249 (Minn. 1980). In addition, in evaluating a hostile environment claim, it is appropriate to consider the overall situation experienced by the claimant:

> [The trier of fact] should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode. Instead, the trier of fact must keep in mind that "each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes." [Citation omitted.] "A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents but on the overall scenario." [Citation omitted.]

Burns v. McGregor Electronic Industries, Inc., 955 F.2d 559, 564 (8th Cir. 1992) (under Title VII). In addition, the Burns court indicated that the appropriate standard in such cases is that of "a reasonable woman under similar circumstances," thereby expressing its agreement with the decision in Ellison y, Brady, 924 F.2d 872, 878-79 (9th Cir. 1991). While the Burns and Ellison cases were decided under Title VII, the Minnesota Supreme Court has often relied upon federal case law developed in discrimination cases arising under Title VII in interpreting the MHRA. It thus is appropriate to apply the same standards in the present case.

The Administrative Law Judge has concluded that the Department established a prima facie case of sexual harassment and ultimately proved its harassment claim by a preponderance of the evidence. With respect to the prima facie case, there was convincing evidence that Ms. Tinglov, a protected class member who was employed by J.C. Penney, was subjected to repeated unwelcome physical touching based on sex. Ms. Tinglov credibly testified that Mr. Lebacken touched her breasts on two separate occasions; touched her buttocks on one occasion; touched her shoulder the day after she confided in

him that she had been the victim of sexual abuse as a child and asked him not to touch her again; and stuck the edge of a floor tile between her buttocks in September 1991. I/

The Judge has credited the testimony of Ms. Tinglov regarding the incidents of sexual harassment and the lunchroom conversation despite the testimony of Mssrs. Vasek and Lebacken. Mr. Lebacken denied that he ever touched Ms. Tinglov's breasts or that he ever touched her buttocks "with sex on [his) mind." Ex 9. Regarding the lunchroom conversation involving the tile incident, Mr. Lebacken testified that he had merely told Mr. Vasek that he had accidentally bumped Ms. Tinglov with a piece of tile "in the leg or hip" and she had gotten mad. Mr. Lebacken testified that he could not recall that Mr. Vasek ever asked him anything more about the tile Incident. T. 163. In contrast, Mr. Vasek testified that Mr. Lebacken had told him that he hit Ms T inglov " in the behind with a tile " and that he had asked Mr Lebacken if it was accidental and Mr. Lebacken said, "Yes." T. 196, 198; Ex. 10. The determination to credit Ms. Tinglov's testimony was based in large part upon her straightforward and honest demeanor at the hearing, the consistencies between her testimony and prior statements to co-workers and the Departmentof Human Rights, the inconsistencies in the testimony of Mssrs. Lebacken and Vaskek, and evidence offered by the Complainant tending to show that Mr. Lebacken made remarks to other co- workers about Ms. Tinglov's breasts as well as the breasts of other females. Mr. Lebacken has an obvious interest in denying the charges to avoid embarassment and discipline. Mr. Vasek is a longtime friend of Mr. Lebacken who has an interest in protecting Mr. Lebacken and avoiding discipline for failing to investigate further following the lunchroom conversation.

Although Ms. Tinglov did sign statements written by Department of Human Rights personnel that gave an inaccurate date, she corrected this error during the testimony at the hearing and explained that she had not caught the error at the time due to her depression and stress. The fact that the statements

referred to the wrong date does not undermine the veracity of Ms. Tinglov's testimony regarding the incidents of harassment. Moreover, the fact that Ms. Tinglov permitted Mr. Lebacken to deliver an old store fixture to her home and visited the home of Mr. Lebacken and his wife after a wedding they had attended does not undermine her sexual harassment claim, and is consistent with her effort to overlook the harassment and avoid "making waves."

Mr. Lebacken's physical contact with Ms. Tinglov was unwelcome, sexually motivated physical contact. Mr. Lebacken touched Ms. Tinglov's breasts and

Ms. Tinglov, who was the victim of sexual abuse during her childhood, testified that she believed that Mr. Lebacken had also touched her on other occasions but that she had blocked out the memory of these incidents. T. 27, 52, 62, 63, 65. Connie Schultz, Ms. Tinglov's therapist, indicated that many victims of sexual abuse resort to coping skills such as repressing or blocking memories in order to deal with the stress or trauma. T. 274-75. It would be improper, however, to rely upon such vague allegations as evidence that Mr. Lebacken did, in fact, engage in improper conduct on other occasions. Accordingly, the Judge has considered only the incidents that Ms. Tinglov specifically recalled and which were found by the Judge to have occurred (see Finding of Fact No. 7) in considering whether Ms. Tinglov was in fact subjected to sexual harassment in violation of the MHRA.

buttocks on four occasions over less than nine months, usually under the guise of "cleaning her off." Ms. Tinglov indicated that Mr. Lebacken engaged in this conduct when she least expected it, always catching her off- guard. T. 27. She objected to the touching after it occurred and even told him of her sexual abuse as a child in an attempt to get him to stop touching her. The day after she confided in him, he deliberately touched her again, albeit on the shoulder rather than the breasts or buttocks. Contrary to J.C. Penney's suggestion in its post-hearing briefs, there was no evidence that Ms. Tinglov was "over-sensitive" or that she misconstrued innocent or inadvertent contact as sexual contact. This is conduct that a reasonable woman would consider sufficiently severe and pervasive to create a hostile and offensive working environment.

The incidents of physical contact, taken as a whole and considering their cumulative effect, in fact created an intimidating, hostile and offensive working environment for Ms. Tinglov. Mr. Lebacken's behavior made Ms. Tinglov fearful of him and afraid that her previous sexual abuse was "happening again." She felt ashamed and cheap. She became depressed, had thoughts of suicide, and struggled with binging and purging. Although she had previously enjoyed her job and was proud to be working, she began to hate her job after the touching incidents and left work at the earliest opportunity instead of joining her co-workers for a "break" after work. She also withdrew from social activities outside of work because she did not want her friends to see how unhappy she was.

The major issues with respect to the Complainant's prima facie case are whether Mr. Lebacken's knowledge of his actions should be imputed to J.C. Penney or whether J.C. Penney knew or should have known about the harassment, and whether J.C. Penney failed to take timely and appropriate corrective measures. It is undisputed that Ms. Tinglov did not formally report the harassment to Ralph Vasek (the manager of the maintenance department) or to any other person employed by J.C. Penney in a managerial capacity. As the Minnesota Supreme Court noted in McNabb v. Cub Foods, 352 N.W.2d 378, 383 (Minn. 1984), however, the victim of sexual harassment "[is] not required to formally complain of sexual harassment of which the employer had knowledge." Similarly, the Court of Appeals determined in Bersie v. Zycad Corp., 417 N.W.2d 288, 291 (Minn. Ct. App. 1987), that employer liability for harassment may be created through either actual knowledge of incidents or the fact that incidents were so obvious or pervasive that the employer should have known of the misconduct.

A management employee's knowledge of sexual harassment is frequently imputed to the employer. McNabb, 352 N.W.2d at 383, (where the victim had complained to her immediate supervisor regarding sexual harassment by co-workers, knowledge of supervisor was imputed to the employer); Heaser v. Lerch, Bates & Associates, 467 N.W.2d 833, 835 (Minn. Ct. App. 1991) (where

sexual harassment is committed by a manager, knowledge of the harassment is imputed to the employer and the victim is not required to make further complaints absent specific, detailed company policy). In the present case, there is a threshold issue regarding the supervisory or non-supervisory status of Mr. Lebacken. Ms. Tinglov erroneously believed that Mr. Lebacken was the assistant manager of the maintenance department. While there is some evidence that Mr. Lebacken informally directed the work activities of maintenance department employees when Mr. Vasek was absent or occasionally when Mr. Vasek was present, Mr. Lebacken in fact had no supervisory authority. In analogous

cases, the Equal Employment Opportunity Commission and several courts have determined that employees who act in "lead" capacities, exercise some role in work assignments, or oversee the work of other employees are not supervisors who should be deemed agents of the employer under Title VII where they have no authority to discipline, hire, or fire others. See, e.g., Swentak v. US Air, 830 F.2d 552 (4th Cir. 1987); Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486 (M.D. Fla. 1991); Commission Decision 83-1, 31 Fair Empl. Prac. Cas. (BNA) 1852 (1982). Ms. Tinglov's erroneous belief that Mr. Lebacken could control her work assignments or make recommendations regarding hiring and firing is insufficient to overcome the reality that he In fact had no such authority. Ste Showalter v. Allison Reed Group Inc. 767 F. Supp. 1205, 1210-11 (D.R.I. 1991). Because Mr. Lebacken was not a supervisor, it is concluded that his actions should not be imputed to J.C. Penney.

The question thus becomes whether J.C. Penney knew or should have known of the existence of the harassment. The Department argues that J.C. Penney knew or should have known of the harassment at the very latest on September 19 or 20, 1 991 , when Mr. Lebacken told Mr. Vasek that he had " stuck a tile between Becky's crack." J.C. Penney contends that Mr. Lebacken merely told Mr. Vasek that he had bumped her in either her leg or her hip with a piece of tile and Becky thought that he had pinched her, and contends that such a statement was insufficient to put the company on notice of Mr. Lebacken's actions.

As noted above and in Finding of Fact No. 9, the Judge has credited Ms. Tinglov's testimony in this regard and has determined that Mr. Lebacken told Mr. Vasek in the lunchroom that he had "stuck a tile between Becky's crack" and that Ms. Tinglov had told him she would hit him if he did that again. Mssrs. Vasek and Lebacken were both smiling and laughing. Ms. Tinglov, who was seated at the same table, became angry and upset. She stared at Mr. Vasek, who saw her and stopped laughing. Ms. Tinglov then left the table. The Judge is persuaded that Mr. Lebacken's statement in the lunchroom, coupled with Ms. Tinglov's reaction, placed Mr. Vasek on notice of a potential harassment situation and obliged him to investigate further. At a minimum, Mr. Vasek or some other appropriate J.C. Penney manager should have asked Ms. Tinglov what had happened. Had such an inquiry been made, the entire history of harassment might have been revealed. See McNabb, 352 N.W.2d at 383 (the employer's position that victim's supervisor did not know that sexual harassment was occurring "begs the question;" since the victim's immediate supervisor knew that she had been hit by a co-worker, some sort of

investigation was required, and "it would seem logical that an investigation would have surfaced the entire problem"). In addition, an indication that the company was concerned about harassment and wanted to ensure that Ms. Tinglov was not experiencing such harassment might have convinced her that she should keep working for J.C. Penney.

Mr. Vasek testified that he felt he had no duty to investigate because he had not seen the incident himself and Ms. Tinglov had not complained to him. His approach to the situation, however, amounts to a decision to ignore evidence of potential sexual harassment and intentionally stay in the dark. As the District Court noted in Robinson v. Jacksonville-Shipyards. Inc., 760 F. Supp. 1486, 1530 n.10 (M.D. Fla. 1991), ignoring evidence of sexual harassment is analogous to the criminal law concept of deliberate ignorance. Quoting the Seventh Circuit in United States v. Ramsey, 785 F.2d 184, 189 (7th Cir.),cert. denied, 476 U.S. 1186 (1986), the Robinson court stated, "When

someone knows enough to put him on inquiry, he knows much. If a person with a lurking suspicion goes on as before and avoids further knowledge, this may support an inference that he has deduced the truth and is simply trying to avoid giving the appearance (and incurring the consequences) of knowledge." Mr. Vasek was the manager of the maintenance department and the supervisor of Mr. Lebacken and Ms. Tinglov. It is appropriate to impute his actual knowledge of the harassment to J.C. Penney. Sly McNabb, 352 N.W.2d at 383.

The final factor to be considered with respect to the prima facie case requirement is whether J.C. Penney failed to take timely and appropriate corrective measures. An employer may avoid apparent liability for acts of sexual harassment committed by a co-worker if it shows that it took "timely, appropriate, remedial action." Tretter v.-Liquipak internAtiQnal, Inc., 356 N.W.2d 713, 715 (Minn. Ct. App. 1984). Such action "may include dissemination of an anti-harassment policy, transferring the employee to another shift, or taking or threatening disciplinary action against offending employees." Id. at 715-16, citing McNabb-v. Cub Foods, 352 N.W.2d 378, 384 (Minn. 1984). The Tretter court emphasized that "[a]n employer must take strong, swift action to separate itself from the harassment of the offending supervisor." 356 N.W.2d at 716.

It is generally held that employers must undertake a reasonable investigation to obtain the truth and take disciplinary action that is in line with the severity of the harassment. Waltman v.-International Paper CO-., 875 F.2d 468 (5th Cir. 1989); Swentek v. USAir, 830 F.2d 552 (4th Cir. 1987). The remedial measures taken to correct harassment must be prompt and reasonably calculated to end the harassment. See, e.g., Ellison-v. Brady, 924 F.2d 872 (9th Cir. 1991). Employers must take action within hours or days; waiting even four weeks before acting has been held to be too long. Bennett v. New York City Department_of_Corrections, 705 F.Supp. 979 (S.D.N.Y. 1989).

In the present case, it is undisputed that Mr. Vasek never inquired further regarding the working conditions of Ms. Tinglov after hearing of the tile incident. Once the formal discrimination charge was received on November 1, 1991 (after Ms. Tinglov had left her employment with the company), J.C. Penney conducted an investigation. Company managers interviewed Mssrs. Lebacken and Vasek and several other employees, but did not contact Ms. Tinglov. J.C. Penney ultimately concluded 2/ that Mr. Lebacken had not engaged in the alleged harassment. Accordingly, no disciplinary action was ever taken against Mr. Lebacken.

Mr. Vasek (or another appropriate J.C. Penney manager) had a duty to take prompt steps to investigate after being told of the tile incident and observing Ms. Tinglov's reaction. Instead, he chose to deliberately ignore

the problem because Ms. Tinglov had not explicitly complained of harassment and because he believed the tile incident to be "accidental." Nothing was done by the company until after Ms. Tinglov had resigned and they received her discrimination charge in November, more than five weeks after the tile incident was discussed in the lunchroom. Such an approach clearly does not reflect timely and appropriate action on the part of the company.

2/ The employee interviews were apparently completed on November 13, 1991. There is no indication in the record on what date the company reached its conclusion that the allegations were untrue.

Furthermore, J.C. Penney failed to take appropriate remedial action even after it received the discrimination charge on November 1, 1991. First, the company did not interview Ms. Tinglov as part of Its investigation, apparently because she was no longer employed and had filed a discrimination charge. Although the parties have not cited any relevant authority on this point and the Judge was unable to find any, a reasonable investigation of a harassment allegation would seem necessarily to include an attempt to contact the individual who made the allegation. The absence of such an attempt appears to reflect a disinterest in finding out if there is a problem and remedying the situation. Although the company understandably may have been reluctant to contact an unrepresented former employee who had filed a discrimination charge and such an employee may not be willing to cooperate, company representatives should have made an attempt to reach Ms. Tinglov through the Department of Human Rights in order to exchange relevant information. Indeed, the investigation and processing of discrimination charges is supposed to include such exchanges of information. The discrimination charge itself did not contain a detailed description of any of the alleged incidents of harassment or identify co-workers who Ms. Tinglov believed might have relevant information. Had J.C. Penney asked pertinent questions of Ms. Tinglov, it is likely that she would have mentioned that she discussed the incidents with co-workers Doering, Wahel, Lamphere, and Dornbusch. Subsequent interviews with these individuals would likely have added more credence to Ms. Tinglov's allegations. Second, no disciplinary action was taken against Mr. Lebacken following the investigation based upon the company's determination that he was "innocent," and he apparently was not even told of the company's policy against sexual harassment at that time. The Complainant thus has succeeded in making a prima facie showing that J.C. Penney failed to take timely and appropriate corrective measures.

Since a prima facie showing of sexual harassment has been made, it is necessary to consider whether J.C. Penney has articulated legitimate, nondiscriminatory reasons for its actions or has otherwise rebutted the prima facie case. J.C. Penney argues that Mr. Vasek's inaction was appropriate because Mr. Vasek was told by Mr. Lebacken that the tile incident was

accidental and because Ms. Tinglov did not express a complaint of sexual harassment. As noted above, the evidence was conflicting regarding whether Mr. Lebacken told Mr. Vasek that the incident was accidental. Mr. Vasek testified that he asked Mr. Lebacken whether it was accidental and received an affirmative answer; Mr. Lebacken did not recall any further discussion of the incident with Mr. Vasek. Even if it is assumed that Mr. Lebacken told Mr. Vasek that he accidentally touched Ms. Tinglov with the tile, there would be no legitimate basis for Mr. Vasek's belief that the touching was in fact accidental absent a further inquiry. Ms. Tinglov's angry and upset reaction to Mr. Lebacken's comment is sufficiently inconsistent with an accidental touching to warrant additional investigation before forming a belief regarding the intentional or accidental nature of the incident.

J.C. Penney further contends that it was justified in failing to act since Ms. Tinglov never filed a complaint of sexual harassment. As noted above, because the company had actual knowledge of the harassment, it is unnecessary for a complaint to be filed. Moreover, Ms. Tinglov had a legitimate basis for believing that it would be futile to lodge a complaint with Mr. Vasek. In Dura Supreme v. Kienholz, 381 N.W.2d 92, 95 (Minn. Ct. App. 1986), the plaintiff complained to her foreman and supervisor that she found a remark made by the co-owner of the company offensive. The supervisor

told her to take it as a joke. The plaintiff quit her job the following Monday and applied for unemployment compensation. The Court of Appeals held that the plaintiff was entitled to unemployment compensation because she terminated her employment due to sexual harassment of which her employer was aware:

> Upon a notice of sexual harassment, an employer should be gven the opportunity to correct the problem. [Citations omitted.] However, Kienholz was given no assurance that the problem would be corrected. Her supervisor told her to take it as a joke. This meets the statutory requirement that an employer "knows or should know of the existence of the harassment and fails to take timely and appropriate action."

Because Mr. Vasek laughed when he was told of the tile incident, he apparently viewed the harassment as a joke. Ms. Tinglov thus had no reasonable expection of assistance from him. Moreover, Mr. Vasek has been friends with Mr. Lebacken for thirty years and even notified Mr. Lebacken when the maintenance technician became available at J.C. Penney. The close personal friendship between Mssrs. Vasek and Lebacken was known to Ms. Tinglov and also made it futile for her to complain to Mr. Vasek about Mr. Lebacken's actions. age, e. g. Salazar v. Church's Fried Chicken Inc. 44 Fair Empl. Prac. Cas. (BNA) 472 (S.D. Texas 1987) (employee could have concluded that it would be futile to complain to manager about an assistant manager who was his roommate).

J.C. Penney also argues that it had effective policies in place notifying employees of its opposition to sexual harassment and informing them of avenues of relief, and that those policies made it clear that Ms. Tinglov could have approached managers other than Mr. Vasek. It argues in particular that Ms. Tinglov knew who the Personnel and Operations Manager (Bob Thompson) and the Store Manager (Mervin Cihlar) were and that she should have approached them with her complaints involving Mr. Lebacken. The United States Supreme Court indicated in Meritol Savings Bank v.. Vinson, 477 U.S. 57, 72-73 (1986), that the mere existence of a policy against harassment and a grievance procedure and the failure of a victim to invoke that procedure does not automatically

insulate the employer from liability. The Court stated that the employer's argument that its harassment policy should insulate it from liability "might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." Similarly, in Sanchez v. City of Miami Beach, 720 F. Supp. 974, 979 (S.D. Fla. 1989), the court held that the employer's harassment policy failed in part because the employer "has paid mere lip service to its enforcement. No meaningful steps were taken either to disseminate the policy or to cause instruction regarding its purpose, terms, and objectives."

Ms. Tinglov never read the "Affirmative Action/ Equal Employment Opportunity" policy mentioning "freedom from sexual harassment" (Ex. 57) which was posted on the bulletin board with a number of other materials. Although she received a copy of the "Associate Handbook" (Ex. 59), she thought that only retail sales people were considered to be "associates." On page 2 of the Associate Handbook she received, under the heading "Selection and Placement," the Handbook alluded to J.C. Penney's policy to "provide equal terms and

conditions of employment to all individuals and associates without regard to . . . sex (including freedom from sexual harassment). . . ." That section of the manual did not describe with specificity the behaviors that constitute sexual harassment, advise employees that sexual harassment may result from the behavior of co-workers and well as supervisors, promise protection from retaliation for complainants, or identify several persons with whom complaints could be filed. 3/ Subsequent portions of the Handbook received by Ms. Tinglov indicated that "[e]very associate should feel free to discuss any aspect of his or her job with management associates;" encouraged associates to seek out their supervisor in attempting to resolve any issue or "pursue the matter through the appropriate staff member, personnel associate, or ultimately with the unit manager" if the supervisor cannot provide a satisfactory resolution; and urged associates to "discuss any matter frankly and openly" and "feel perfectly free to cover any issue with the manager." In addition, an "Associate Participation Policy" relating to the company's "open door" policy (Ex. 58) was posted on the bulletin board. Ms. Tinglov never saw this posting. These statements relating to the company's "open door" policy obviously are not sufficient to inform employees of the company's opposition to sexual harassment.

Although J.C. Penney did make efforts to inform and educate managerial personnel about sexual harassment, it is evident that it did not adequately disseminate its policy against sexual harassment to employees. Ms. Tinglov was not alone in lacking familiarity with the policy. Ms. Lamphere, Mr. Becker, and Ms. Doering all testified that they were unaware of the policy. Mr. Lebacken also was unaware of the company's policy against sexual harassment until he attended a training session in early 1993. Under these circumstances, the policy was not effective because it was not transmitted in a meaningful way to non-managerial employees.

In light of the fact that J.C. Penney had actual notice of Mr. Lebacken's harassment of Ms. Tinglov, did not take prompt, appropriate remedial action, and did not effectively disseminate its sexual harassment policy to maintenance department employees, it is concluded that J.C. Penney is liable

for Mr. Lebacken's harassment of Ms. Tinglov. Further, because the company's unfair employment practices created intolerable working conditions which led to Ms. Tinglov's decision to resign, the Judge has determined that Ms. Tinglov's resignation constitutes a constructive discharge. See Continental CAn Co., 297 N.W.2d at 251 ("a constructive discharge occurs when an employee resigns in order to escape intolerable working conditions caused by illegal discrimination"); Danz v. Jones, 263 N.W.2d 395, 403 n.4 (Minn. 1978) ("a resignation which is caused by illegal discrimination is a constructive discharge"). A constructive discharge will be found if a reasonable employer

3/ The version of the Associate Handbook issued in May 1992 discusses "Working Harmony and Freedom from Harassment" in a separate section. The section contains a much more detailed discussion of harassment. It provides some examples of harassment; warns that harassment may result in discipline; urges associates who feel they have been subjected to such treatment to report the matter to "the unit manager" or directly to the "district, Regional or Corporate Office;" and mentions that the name of at least one individual outside the unit who can be contacted is reflected on the Equal Employment Opportunity poster in each facility. Ex. 63, pp. 13-14.

would have foreseen that the plaintiff would resign in the light of the treatment she was receiving. Wheeler v, Southland Corp., 875 F.2d 1246, 1249-50 (6th Cir. 1989). Mr. Vasek merely laughed when he heard of the tile incident and, despite Ms. Tinglov's reaction, never inquired of her what had happened. Ms. Tingloy had experienced psychological problems as a result of the harassment and her therapist and her psychiatrist recommended that she resign. In this case, a reasonable employer should have foreseen that Ms. Tinglov would resign in light of the treatment she had received.

Relief

Minn. Stat. 363.071, subd. 2 (1990), authorizes the Administrative Law Judge to order affirmative relief to effectuate the purposes of the MHRA. In this case, the Judge has required J.C. Penney to cease and desist from any further sexual harassment and to distribute its sexual harassment policies and procedures to all employees within sixty days. The Judge suggests that the company clarify that all employees are considered "associates" in order to avoid any further confusion regarding the meaning of this term.

Minn. Stat. 363.071, subd. 2 (1990), authorizes an award of compensatory damages to the victims of discrimination under the MHRA. The general purpose of the damages provision is to make victims of discrimination whole by restoring them to the same position they would have attained had no discrimination occurred. Anderson v. Hunter, Keith Marshall & CO. 417 N.W.2d 619, 626 (Minn. 1988); Brotherhood of Railway and Steamship clerks v. Balfour, 303 Minn. 178, 229 N.W.2d 3, 13 (1975). Persons complaining of discrimination do, however, "have the duty to minimize damages by using reasonable diligence in finding other suitable employment." Anderson, 417 N.W.2d at 626, quoting Ford Motor Co. v. EEOC, 258 U.S. 219, 231 (1982). The employer bears the burden of proving that a charging party did not mitigate her damages. Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978); Sprogis v. United Airlines, 517 F.2d387 (7th Cir. 1975); accord Henry v. Metropolitan Waste Control Commission, 401 N.W.2d 401, 406 (Minn. Ct. App. 1987) (discharge of veteran); Spurck v. Civil Service Board, 42 N.W.2d 720, 727 (Minn. 1950) (discharge of public employee).

In order to bear its burden of showing a failure to mitigate, the employer must show that (1) substantially equivalent positions were available for the charging party to take, and (2) the charging party did not exercise reasonable diligence in seeking positions. Wooldridge v. Marlene Industries, 49 Fair Empl. Prac. Cas. (BNA) 1455 (6th Cir. 1989). In EEOC v. Gurnee_Inn Corp., 914 F.2d 815 (7th Cir. 1990), the Seventh Circuit stated that, "To prevail, the employer must prove both that the [claimants were] not reasonably diligent in seeking other employment, and that with the exercise of reasonable diligence there was a reasonable chance that [the claimants] might have found comparable employment.'" Id. at 818, quoting U-S. y.-City of Chicago, 853 F.2d 572, 578 (7th Cir. 1988). The court in Gurnee inn denied summary judgment to the employer where the employer alleged that the claimants had failed to seek other employment but had not established that there was a reasonable chance the claimants could have found comparable employment.

J.C. Penney argues that Ms. Tinglov failed to mitigate her damages by not actively looking for other employment following the termination of her employment with J.C. Penney. Ms. Tinglov found it difficult following her termination to consider working in another employment situation where she

might again be harassed. Although it may be understandable for her to have been somewhat "gun shy" about looking to another job (see Gurnee Inn, 914 F.2d at 818 n.4) or even to have waited for a period of time following the termination of her employment due to her loss of self-esteem and psychological problems, she submitted at most only one application (to an ice cream parlor) in the eighteen months following the terminat i on of her employment at J. C. Penney. While her therapist testified that she would not have recommended that Ms. Tinglov regain employment in October 1991 , due to the severity of her psychological symptoms, there was no evidence that this condition continued to the date of the hearing. The Judge thus finds that J.C. Penney succeeded in establishing that Ms. Tinglov was not reasonably diligent in seeking other employment. J.C. Penney did not, however, demonstrate that there was a reasonable chance that Ms. Tinglov might have found comparable employment. There was no evidence that Ms. Tinglov was qualified for the ice cream parlor job or the nursing home cleaning position for which she considered applying or that these jobs had comparable hours and pay to Ms. Tinglov's former job, and there was no evidence of other job openings for which Ms. Tinglov would have been qualified. Because J.C Penney failed to introduce evidence establishing the second prong of its required showing regarding mitigation, it has not borne its burden to show that Ms. Tinglov failed to mitigate her damages.

J.C. Penney also contends that the backpay awarded Ms. Tinglov should be tolled based upon her refusal to accept its unconditional offer of reinstatement made in January 1993. The offer was left open until January 31, 1993. In its letter making the offer, the company indicated that, as part of the offer, "we can assure Ms. Tinglov that the type of conduct which she alleges will not be tolerated and will not occur." Ex. 8. Ms. Tinglov refused to accept the offer because Mssrs. Lebacken and Vasek would still be there and she was afraid that they would harass her and not treat her fairly. In Ford Motor Co. v. EEOC, 458 U.S. 219 (1982), the United States Supreme Court held that, "absent special circumstances," the on-going accrual of backpay liability under Title VII is tolled when a claimant rejects the employer's offer to hire or reinstate him or her.

J.C. Penney relies upon the decision of the Eighth Circuit in Morris v. American National Can Corp. , 952 F.2d 200 (8th Cir. 1991), to support its argument that any backpay liability of J.C. Penney with respect to Ms. Tinglov's claims should be tolled as of January 31, 1993. In Morris, the employer offered to reinstate the plaintiff, who had alleged sexual harassment, to her former position prior to the trial. She did not accept the offer when it was first made because at that time she did not believe the employer's assurances that it would protect her from further sexual harassment and felt that a return to work in a sexually hostile environment would have resulted in her taking a "demeaning" position. let Ford Motor Co._v. EEOC,

458 U.S. at 231 ("the unemployed . . . claimant need not go into another line of work, accept a demotion, or take a demeaning position . . . .") She ultimately accepted the offer three months after it was made and returned to work nearly six months after the offer was extended. The Eighth Circuit tolled backpay liability from the date the offer was made. The Court stressed that, based on its review of the testimony of employer representatives and the correspondence between the employer and the plaintiff regarding the terms of her reinstatement, the Court "was satisfied that this evidence shows that American Can was sincere in its claim that it was prepared to protect Morris from any further sexual harassment." Id. at 203. The Court also noted that

it viewed the plaintiff's "ultimate return to her position as evidence that the company was prepared to protect [her] from any further sexual harassment." Id.

The Administrative Law Judge agrees with the Complainant that the situation here does not resemble that in Morris. Based upon the entire record in this proceeding, it appears that "special circumstances" were present here and that Ms. Tinglov reasonably refused the reinstatement offer. Despite the written assurance in the offer letter, the evidence does not demonstrate that J.C. Penney was prepared to protect Ms. Tinglov from further sexual harassment. Mr. Lebacken had not been disciplined for his harassment of Ms. Tinglov; instead, as the Complainant points out, he had the full support of Mr. Vasek and upper management. There is not even any evidence that anyone had talked to Mr. Lebacken about the company policy against sexual harassment at the time the reinstatement offer was made. Mr. Vasek also had not been reprimanded for his failure to investigate Mr. Lebacken's remark about the floor tile incident. Further, there was no testimony at the hearing concerning what, if any, measures would have been taken to ensure that Ms. Tinglov would not again have been subjected to sexual harassment.

The State argues that Ms. Tinglov's damages should be based upon a "reasonable approximation" of $100 per week because she decreased her hours at work during the end of her employment due to her unhappiness. Because there was no specific testimony offered to explain the extent and duration of such a voluntary reduction in hours, the $100 per week figure is too speculative and will not be used. Ms. Tinglov's backpay is properly calculated based upon 17.5 hours per week, which is the average number of hours she worked over the length of her employment. Accordingly, Ms. Tinglov's actual damages are properly calculated as follows:

$5.25/hour x 17.5 hours/week = $91.88/week

$91.88/week x 97 weeks (Oct. 11, 1991 - August 20, 1993) - $8,912.00

The Judge has determined that actual compensatory damages in the amount of $8,912.00 should be awarded in this case, plus prejudgment interest from October 11, 1991. That amount will fully and adequately compensate Ms. Tinglov and should not be trebled (as urged by the Complainant) or doubled. There is no evidence in the record to support the Complainant's argument that Ms. Tinglov has lost employment references or the opportunity to obtain other positions with more hours and higher pay, nor is there an adequate basis for holding J.C. Penney responsible for her continuing failure to make serious attempts to find another job.

Under Minn. Stat. 363.071, subd. 2 (1990), victims of discrimination

are entitled to recover for mental anguish and suffering. In this case, the Administrative Law Judge is persuaded that Ms. Tinglov is entitled to an award of $25,000 for the mental anguish and suffering she endured during and after her employment at J.C. Penney. The record demonstrates that Ms. Tinglov suffered severe mental anguish as a result of Mr. Lebacken's sexual harassment. She frequently broke into tears during her testimony at the hearing, and it is evident that she is still very upset by the treatment she received while employed at J.C. Penney. She felt cheap and guilty after Mr. Lebacken touched her and began to hate her job. She found it necessary to return to her therapist, Connie Schultz, in June 1991 and September 1991. In

June 1 991 , Ms Tinglov suffered from depression, tearfulness , diminished self-esteem, disturbed sleep and concentration, and an eating disorder. By September 1991, there had been a more severe escalation in her symptoms and she was "falling apart." Ms. Schultz testified that Ms. Tinglov's "symptomatology, the depression, the isolation, the binging and purging, the self-blame, the self-hate was really pretty severe, extremely tearful, much difficulty maintaining a conversation and concentrating even throughout the time frame of the therapy session itself." Ms. Schultz "was extremely concerned about Becky by the end of September. Suicidal ideation was occurring without a plan." Ms. Schultz recommended increased therapy sessions and a psychiatric consultation. Ms. Tinglov was eventually placed on medication.

The Complainant has requested that mental anguish damages be awarded in the amount of $100,000. That amount is deemed to be excessive for several reasons. First, factors other than the harassment Ms. Tinglov endured while employed by J.C. Penney contributed to the mental anguish and psychological symptoms she has suffered. Tragically, Ms. Tinglov was the victim of sexual abuse as a child. While the record does not reflect the details of that abuse, it was characterized as "severe" and apparently occurred when Ms. Tinglov was between the ages of 6 and 14. When Mr. Lebacken began to touch Ms. Tinglov, she testified that she was afraid that the abuse was "happening again." T. 31; Ex. 6. She had been in counseling for several years prior to her employment with J.C. Penney. Ms. Schultz, while attributing Ms. Tinglov's symptoms to her employment experiences at J.C. Penney, later admitted that Ms. Tinglov's background and several "other things that Ms. Tinglov was dealing with" may have been partially contributory to her condition in September, 1991. T. 286. Second, no evidence was offered concerning Ms. Tinglov's present emotional state or the length of time following the termination of her employment that she experienced problems. Finally, the circumstances of this case do not approach those involved in the cases supplied by the Complainant in which greater mental anguish damages were awarded. In those cases, the

harassment was more frequent and severe and there was evidence that the claimant continued to require additional therapy to overcome the effects of the trauma caused by the harassment. An award of $25,000 is supported in the present case.

Pursuant to Minn. Stat. S363.071, subd. 2, and 549.20 (1990), punitive damages may also be awarded for discriminatory acts when there is clear and convincing evidence that the employer's acts show a deliberate disregard for the rights or safety of others. In Tretter, 356 N.W.2d at 716, the Minnesota Court of Appeals determined that an award of punitive damages was justified by a six-month period of sexual harassment, the employer's failure to discipline the supervisor who committed the harassment, and the later termination of the harassed employee. In this case, the evidence shows that Mr. Vasek deliberately disregarded Ms. Tinglov's rights or safety when he failed to make a further inquiry regarding the tile incident. Under the circumstances of this case, the Administrative Law Judge finds that punitive damages in the amount of $2,000.00 should be awarded.

Finally, Minn. Stat. 363.071, subd. 2 (1990), requires the award of a civil penalty to the State when an employer violates the provisions of the MHRA. Taking into consideration the seriousness and extent of the Respondent's violation, the public harm occasioned by it, the financial resources of the Respondent, and the violation that occurred, it is concluded

that the Respondent should pay a civil penalty to the State in the amount of $7,500.00. The charges Ms. Tinglov filed resulted in significant agency involvement and were pursued by the Department to hearing. The amount of the civil penalty reflects the substantial investment of public resources in the hearing and determination of this matter.

B.L.N.